United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-6120

To be argued by: Philip B. Abramowitz

B

P/S

In The

United States Court of Appeals

For the Second Circuit

ALBERT M. BILLITERI,

Appellee,

v.

UNITED STATES BOARD OF PAROLE and MEMBERS OF THE UNITED STATES BOARD OF PAROLE, Individually and in Their Official Capacity, and UNITED STATES OF AMERICA,

Appellants.

On Appeal from the United States District Court for the Western District of New York

BRIEF OF APPELLEE

PHILIP B. ABRAMOWITZ, ESQ.
76 Niagara Street
Buffalo, New York 14202
Telephone No. (716) 855-0717
Attorney for Appellee

Of Counsel:
MARTOCHE, COLLESANO,
ABRAMOWITZ & GELLER
Attorneys at Law
ROBERT C. MACEK,
on the Brief

Daily Record Corporation
Rochester, New York

(1751)

Spaulding Law Printing
Syracuse, New York

2

TABLE OF CONTENTS

TABLE OF CASES

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 75-6120

ALBERT M. BILLITERI

Appellee

v.

UNITED STATES BOARD OF PAROLE and MEMBERS OF THE UNITED STATES BOARD OF PAROLE, Individually and in Their Official Capacity and UNITED STATES OF AMERICA

Appellants

BRIEF OF APPELLEE

PRELIMINARY STATEMENT

The Defendants, United States Board of Parole and members thereof, appeal from an order of the United States District Court for the Western District of New York, the Honorable John T. Curtin, District Judge, requiring the release of the Plaintiff from prison to parole. Billiteri v. Board of Parole, 400 F.Supp. 402 (W.D.N.Y., 1975), (Billiteri III), pursuant to which order Plaintiff was released from prison four days prior to the date on which he would

have served his maximum sentence. The District Court, in prior opinions and orders in the same case, 385 F.Supp.1217 (Billiteri I) and 391 F.Supp. 260 (Billiteri II), had determined that Plaintiff was denied due process in his initial Parole Board hearing February 14, 1974, and again in a hearing conducted upon remand from the District Court. The Court, after determining that it would be inequitable to remand for further hearings by the Parole Board, in light of the Board's past performance and the long delays inherent in such remands, held, after a hearing, that the Parole Board had improperly placed Plaintiff's offense behavior in the "very high severity" category under the Board's regulations, and ordered the Board to release Plaintiff on parole.

This case again* presents to this Court questions concerning the application of United States Parole Board Regulations, 28 C.F.R. Part 2, and the limitations placed on Board procedures by the due process clause. Appellee submits that the Court's recent decisions in Cardaropoli v. Norton, 523 F.2d 990 (2d Cir. Sept. 29, 1975), decided twelve days after Judge Curtin's order below, and Johnson v. New York State Board of Parole, 500 F.2d 925 (2d Cir. 1974), are fully controlling and that under these decisions, the Parole Board's actions herein are deficient in numerous particulars: the Defendants' failure to give Appellee notice of their intention to label him a special offender or oj/oc (see Cardaropoli, 523 F.2d at 996), or of their intention to elevate his offense characteristic classification to "very high severity" (Id.); their failure to afford

---

* This Court has previously been called upon to construe these regulations in United States v. Slutsky, 514 F.2d 1222 (2d Cir. 1975); Grasso v. Norton, 520 F.2d 27 (2d Cir. 1975); and Cardaropoli v. Norton, 523 F.2d 990 (2d Cir. 1975); cf. Johnson v. Chairman, New York State Board of Parole, 500 F.2d 925 (2d Cir. 1974).

him an opportunity to view and attempt to explain or rebut the evidence on which those classification decisions were made (Id.); and their failure to afford him a personal appearance before the decision maker (Id.); and that in light of these deficiencies, Judge Curtin was fully justified in ordering Appellee released.

QUESTIONS PRESENTED

(1) Whether the District Court had jurisdiction of this case?

(2) Whether the procedures utilized by the Board of Parole in this case denied Appellee due process?

(3) Whether the District Court erred in not ordering Appellee released after it concluded that the Board had violated Petitioner's due process rights and the Court's own mandate?

(4) Whether the District Court erred in concluding that Appellee had been improperly placed in the "very high severity" category of offense behavior by Defendants?

STATUTES AND REGULATIONS INVOLVED

Due to their length, the Statutes and Regulations involved in this case are included after the text.

STATEMENT OF FACTS

On July 5, 1972, Plaintiff-Appellee, Albert M. Balliteri, pleaded guilty to one count of conspiracy, a violation of 18 U.S.C. §371. He was subsequently sentenced to a term of 5 years. The four substantive counts of the indictment, charging extortionate extensions of credit, were dismissed as part of the plea arrangement.

Upon service of one-third of his sentence, 18 U.S.C. §4202, Plaintiff became eligible for parole. An initial parole hearing was held on February 14, 1974, and on March 11, 1974, the Board issued an order which provided that the Plaintiff "continue to expiration."* The reason cited was "your release at this time would depreciate the seriousness of the offense commi ed and is thus incompatible with the welfare of society." (App. 11) After exhausting his administrative remedies in July, 1974, Plaintiff filed the complaint in No. 74-365, alleging that he was not accorded due process by the Board's hearing procedure, and that the reason for denial of parole was arbitrary,

---

* Expiration, under 18 U.S.C. §4163 would be at the end of 5 years less the time allowed for good conduct under 18 U.S.C. §§4161 and 162.

capricious, without foundation and unlawful, and praying for a declaration that Plaintiff was entitled to parole, or in the alternative, for a new hearing fully comporting with due process standards (App. 8-10). Judge Curtin, the same day, issued a show cause order based upon an affidavit of counsel (App. 13-14), showing plaintiff's reliance upon Candarini v. Attorney General, 369 F.Supp. 1132 (E.D.N.Y. 1974), which held insufficient a statement of reasons identical to those given plaintiff and which, counsel was informed, was being acquiesced in by the Government. (App. 13-14) The Government's response conceded that the stated reasons were insufficient and a denial of due process, but contended that an affidavit, dated August 16, 1974, (six months after the Board's decision), by John Sicoli, Senior Analyst, United States Parole Board, was sufficient compliance with Candarini.

---

* Mr. Sicoli's affidavit (App. 16-17) stated that he had examined the Parole Board's file on plaintiff, and stated the following as the purported reasons of the Board's decision:

> Mr. Billiteri's offense behavior was rated as a very high severity and he received a salient factor score of 6. Guidelines established by the Board which considered these factors indicate a range of 36-45 months to be served before release for adult cases with good institutional program performance and adjustment. After consideration of all relevant factors and information presented, it was found that a decision outside the guidelines was not warranted at this time. Therefore, the Board ordered that Mr. Billiteri be continued to expiration. (App. 18)

Mr. Sicoli's affidavit contained a serious error of fact, however, in its statement that plaintiff had been "convicted of conspiracy and extortionate extension of credit." (App. 17) Plaintiff had been convicted only of the crime of conspiracy, 18 U.S.C. §371. The affidavit does not allege that Mr. Sicoli was present at the meeting, nor what records in the file he inspected, nor does it give any account of the basis on which Mr. Sicoli concluded that the above was the Board's reasoning except that he had "examined the file." Neither the file nor any documents from it were produced.

Plaintiff had not been informed of these "reasons" for the Board's action nor the evidence on which they purportedly were based before exhausting his administrative appeal from the Board's decision of March 11, 1974, let alone before the Parole Board's hearing on February 14, 1974. These reasons were made known to Plaintiff for the first time in the Sicoli affidavit of August 16, 1974.

On this record, Judge Curtin issued an Opinion and Order dated November 26, 1974. Billiteri v. United States Parole Board, 385 F.Supp. 1217 (Billiteri I) (App. 40-52). The Court found:

> It is clear that the decision rendered by the Board is grounded upon an erroneous factual base. ...the Court is forced to conclude that there was an abuse of discretion under 18 U.S.C. Section 4203 and that the Board's decision violates the Plaintiff's right to due process. (App. 46, 385 F.Supp. at 1219)

The Court noted that the incorrect statement of Plaintiff's

offense might very well have caused the Parole Board to assign a "very high severity" classification* in error. The Court stated:

> On this record...the Court must decline to categorize the Plaintiff's offense behavior. The complexity of the types of decisions the Board must make, especially with the regulations so new, is easily recognized. This Court has no desire to act as a super parole board. The appropriate course is to remand the matter to allow the Board to consider all of the factors bearing upon the function it has been charged with by the Congress. (App. 49, 385 F.Supp. at 1220).

The Court ordered that the Defendant be discharged unless the Parole Board reconsidered his application within 30 days. (App. 51, 385 F.Supp. at 1220).

---

* The issue of the proper severity classification of Plaintiff's "offense characteristics" is at the heart of this controversy. Its significance arises from the Parole Board's guidelines in 28 C.F.R. §2.20 (see infra page). These guidelines are in the form of a table or grid, of which the horizontal axis is the salient factor score (representing a "parole prognosis" based on a prisoner's past history, institutional adjustment, and release plans). The various offense characteristics, from "Low" to "Greatest" severity, form the vertical axis. At the point of intersection of each salient factor score and each offense characteristic category, there appears a range of a number of months, which is the recommended time of incarceration. With the salient factor score of 8 assigned to Plaintiff, the guidelines would suggest a range of 20 to 26 months incarceration for an offensive characteristic of "high", but 36 to 45 months for a "very high" severity classification. At the time of Plaintiff's first parole hearing on February 14, 1974, he had been incarcerated 19 months, and by the time of the remand hearing December 11, 1974, he had served 29 months. Therefore, as Judge Curtin stated, "the placement of the offense severity is of utmost importance in making the parole release determination". (App. 230, 400 F.Supp. at 408).

Pursuant to the Court's order, a parole hearing was set down for December 11, 1974, at Lewisburg.

The Court was informed by an affidavit (App. 53) by Joseph M. Pokinski, Administrative Examiner, United States Board of Parole, Northeast Region, dated December 9, 1974, but not filed with the Court until December 20, 1974, that Plaintiff was classified oj/oc,* and that the December 11, 1974, hearing would not be a final decision. Mr. Pokinski's affidavit stated the following:

---

* The consequences of the label oj/oc were considered by this Court in Cardaropoli v. Norton, 523 F.2d 990. (The label "special offender" and "special case" were the terms at issue in Cardaropoli. However, that the oj/oc label is the same breed of animal is made clear by 28 C.F.R. §2.17, which assigns "original jurisdiction" status to "(2) prisoners whose offense behavior... (B) was part of a large scale criminal conspiracy or a continuing criminal enterprise." See also Cardaropoli, 523 F.2d at 992 n.1 and 993 n.3). In Cardaropoli, this Court noted one of the effects of such a label:

> The classification also has significant consequences for an inmate's parole application. The Regional Director of the Board of Parole may designate as within the 'original jurisdiction' of the Regional Directors the application of a special offender whose label is based upon participation in organized crime. 28 C.F.R. §2.17(a), (b)(2) (1974). ... If the classification is found to have some basis in fact, 'his parole release may well be affected, even to the point of exceeding the appropriate length of time prescribed' by the United States Board of Parole Table of Guidelines, 28 C.F.R. §2.20 (1974). Catalano v. United States, supra, 383 F.Supp. at 350. 523 F.2d at 994.

At the very least, such a label will, as in this case, substantially delay consideration of a prisoner's application for parole.

> Mr. Billiteri's case has previously been designated by the Board as an original jurisdiction case pursuant to 28 C.F.R. §2.17. In accordance with that regulation, the five regional directors of the Board are required to make a determination regarding parole by reviewing the summary of the December 11 hearing. Because of the distances involved the regional directors review all original jurisdiction cases at their quarterly meetings. The next meeting will take place on January 13, 1975, at their North Central Region in Kansas City, Missouri. At that time the board will decide the appropriate action to be taken as a result of the December 11 hearing. (App. 53) (Emphasis added).

Although they blandly informed the Court by this Affidavit that the Parole Board's reconsideration would not be complete until after January 13, 1975, almost three weeks after the expiration of the 30-day period ordered by Judge Curtin, the Defendants neither sought a stay, sought an extension of the 30-day period, nor released Plaintiff on parole. The hearing, before an Examiner Panel of the Parole Board, occurred on December 11, 1974, and was attended by Plaintiff and his counsel.* At this hearing, Plaintiff and his counsel were informed for the first time that the

---

* A transcript of that hearing, taken from a tape recording, is of very poor quality and appears at App., pages 100-118. A six-page summary by the Parole Board Examiners, apparently completed at the time of the hearing, though not submitted to the Court until April 30, 1975, despite the Court's order that a transcript be produced (App. 77), appears at App. 423-429. Plaintiff was represented at this hearing by Stanley J. Collesano, law partner of present counsel.

Plaintiff was classified "oj/oc"* and that therefore, the decision on parole would be made not by the Examiners at the hearing but by the Regional Directors at their next meeting. (App. 423, 428-29; 65). Also at this hearing, the Examiners informed Plaintiff and his counsel that his offense behavior was classified "very high severity", and that this action was taken on the basis of the presentence report (App. 397-417) prepared by the United States Probation Department, Western District of New York. Despite counsel's objection, Plaintiff and his counsel were not permitted to inspect this report (App. 102-105; 64). Although Plaintiff knew from the prior proceedings in the District Court that the Parole Board had classified his offense behavior as "very high severity", he had no notice before this hearing of what evidence might be relied on by the Board for this conclusion. Indeed, it was hardly clear that it was based upon anything other than a mistake of fact as to the

---

* The Government's answer on September 5, 1974, had denied Plaintiff's allegation number 13 of his Complaint: "That Plaintiff was denied parole because he is secretly classified by the Government as O.C. or S.O." (App. 9, 27). However, the Examiner's summary of the December 11, 1974 meeting (App. 423) indicates that the Plaintiff's case had been designated "original jurisdiction" at the February 14, 1974 hearing. See also App. 119, 127-28. Later in this litigation, Government counsel, with astonishing chutzpah, complained to the Court that Plaintiff had suddenly, on December 24, 1974, "raised an issue which is completely new and foreign to the original application...namely, an objection to the 'organized crime' designation assigned to Plaintiff," and requested additional time to ascertain from the Parole Board "whether, in fact, such a designation exists and, what, if any ramifications accompany such a designation." "Government's Preliminary Answer" of January 3, 1975, App. 69-72, at 71.

offense of which he had been convicted, which mistake was the basis of Judge Curtin's decision in Billiteri I.

The Examiners, in addition to their decision to forward the case for "original jurisdiction" consideration, made an alternative decision to continue Plaintiff to expiration, which decision would become effective should the Regional Directors not sustain the oj/oc finding. However, Plaintiff was not informed of that alternative decision, but only that his case would be given original jurisdiction treatment (App. 117, 126). (See also App. 148, 391 F.Supp. at 262-263).

On December 24, 1974, after the filing December 20th of the Pokinski affidavit on December 9, 1974 (App. 53), at Plaintiff's request Judge Curtin signed the Show Cause Order returnable January 6, 1975, requiring Defendants to show why Plaintiff "should not be discharged immediately from Federal custody on the ground that the Board of Parole has failed to comply with the Order of the Court dated November 26, 1974" (App. 58). At the same time, a new proceeding was commenced, Civ. 74-580, challenging the oj/oc designation. (App. 55-57) (This second action was immediately ordered consolidated with the first.)

On January 6, 1975, the Government obtained a 10-day adjournment, until January 16, 1975. (App. 74-77) During this time, Plaintiff's counsel requested leave to appear before the Regional Board of Parole at the meeting scheduled for January 13, 1975, and such permission to appear was denied by the Board. (App. 91).*

---

* Plaintiff later submitted to the District Court evidence that in another case, a prisoner's attorney was allowed to appear before the Board on January 14, 1975 (App. 82-90). The Government's explanation for this disparate treatment appears at App. P. 92.

On January 13, 1975, the Regional Directors met as scheduled and denied Plaintiff's application for release. The Panel's action is described in an affidavit of Curtis Crawford, which appears in the Appendix at pages 119-123. According to this affidavit, the Board disclaimed any reliance upon, and purported not to reach, the issue of Plaintiff's organized crime label, but was able to reach an adverse decision allegedly without considering that issue.* The Regional Board again decided that Plaintiff's offense behavior was properly classified "very high severity". The stated reason for this classification is that "the offense behavior as described in the presentence report most nearly resembles the offense of extortion, which is in the very high severity category in the Board's parolling policy guidelines." (App. 120). Fitting that factor together with Plaintiff's salient factor score of 8 into the guidelines of 28 C.F.R. §2.20, the Board read out a range of 36 to 45 months to be served. Plaintiff, having served 30 months at that point, was below even the minimal guideline release date. The Board's final decision was to continue Billiteri to expiration.

The Crawford affidavit (App. 119-123) also attempted to explain and justify the use of the oj oc labelling procedure, and concluded that:

> A prisoner such as Albert Billiteri is appropriately designated for an original jurisdiction consideration

---

* As Judge Curtin put it in Billiteri II "...the disclaimer has a hollow ring." (App. 149, 391 F.Supp. at 262).

> by virtue of the mere allegation of organized crime involvement even though that allegation may never be proved... . (App. 122) (Emphasis added).

The Board's formal order continuing Plaintiff to expiration, dated January 15, 1975, and the first formal notice of Plaintiff that he was classified oj/oc, dated December 18, 1974, were attached to the Crawford affidavit. (App. 124-126).

At the adjourned return date, January 16, 1975, the Government submitted the Crawford affidavit, together with an affidavit of John F. Sicoli, in support of the Government's assertion that the Court's order of November 26, 1974, had been complied with. On the above record,* Judge Curtin issued his second opinion and order in

---

* The Defendants did not submit to the Court, until the later hearing on April 30, 1975, much of the material in the record before the Examiner Panel and the Regional Board: the presentence report (App. 397-417), the hearing summary (App. 423-429), and a Memorandum dated March 15, 1974 from Henry E. Petersen, Assistant Attorney General, Criminal Division (App. 436-437). The Petersen Memorandum, the existence of which was unknown to Plaintiff and to the Court until April 30, 1975, nicely illustrates the evils sought to be avoided by the procedural safeguards mandated by this Court in Cardaropoli v. Norton, supra. In addition to a great deal of TV-thriller language about Plaintiff's alleged role in organized crime (his "name soon became synonymous with fear and terror in every home on the West Side of Buffalo," ... "masterminded an organized ring of criminals," etc.), the Memorandum contains serious errors of fact: for example, it asserts that Plaintiff was convicted and sentenced to 5 years in Sing Sing Prison for sale of narcotics in the early 1950's. Plaintiff has in fact never been charged or convicted of any drug violation. His brother, now deceased, was the person convicted for this drug offense. Further, though this is stated to be a Federal offense, Sing Sing was a New York State prison. Although the Petersen Memorandum, as submitted to the Court and as included in the Appendix, is marked "brother" in handwriting next to the erroneous passage (App. 436), there is no evidence when or by whom the error was caught. Surely however, this is the sort of fact-

this case. Billiteri v. United States Board of Parole, 391 F.Supp. 260 (App. 142-154) (Billiteri II). The Court framed the question: "whether this reconsideration by the Regional Board satisfied the mandates of the order of November 26, 1974." (App. 147, 391 F.Supp. at 262). The Court, without addressing the delay beyond 30 days so casually created by the Parole Board, held that the reconsideration had not satisfied the Court's order. The Court noted that the designation as oj/oc rendered much of the hearing at which Plaintiff and counsel had appeared "an exercise in futility." (App. 150, 391 F. Supp. at 263) The Court went on to consider the reasons stated for the Regional Board's decision:

> An additional disturbing aspect of the Regional Board's determination of January 13, 1975, was the ground for assigning Billiteri's offense behavior to the very high severity category. The stated reason for the categorization was the description of Billiteri's offense behavior in the 1972 presentence report. At the December 11, 1974, Examiner Panel Hearing, this subject was discussed, although the transcript of the discussion is fragmented. ...
>
> At the Board's meeting on January 13, 1975, however, Billiteri did not have representation, permission having been denied on January 8th. In addition, Billiteri did not have the benefit of commenting on the unseen presentencing

---

ual error which would be corrected by the requirement that "the inmate is to be fully informed at [the time of hearing] of the evidence against him." Cardaropoli, supra, 523 F.2d at 996. Nor can any serious argument be imagined for why this almost wholly conclusory memorandum should be held confidential.

> report or the Examiner Panel's report considering his placement in the offense behavior guidelines. In other words, Billiteri had no input whatever in the determination of this important, outcome determining question. The Regional Board, however, at an admittedly original consideration, chose to resolve this question on the basis of the oblique statements contained in a presentence report prepared in 1972. (App. 150-151, 391 F.Supp. at 263-64.)

The Court concluded from its review of the presentence report that the evidence on which the Parole Board based its findings concerning offense characteristics and concerning Plaintiff's organized crime involvement was not conclusive or irrefutable. The Court held:

> The opportunity thus far afforded to Billiteri to contest the allegations, however, was deficient. On December 11, 1974, he was surprised, and on January 13, 1975, when it counted, he was precluded. (App. 151, 391 F.Supp. 263-264.)

The Court concluded:

> I find that these limitations on Billiteri's right to be heard were substantial, resulted in an adverse decision by the Board, and were directly attributable to the oj/oc designation. Clearly a loss of this magnitude requires some procedural protection, Catalano v. United States, 383 F.Supp. 346 (D.Conn. 1974), but no administrative procedures to review the oj/oc question are available. In addition, a considerable passage of time has occurred since these proceedings began. The Board has already had a second opportunity to propound reasons for denying parole, and

> Billiteri alleges hardships which he asks this Court to consider in expediting his application. Under the circumstances, it seems inappropriate to remand to the Board for yet another reconsideration. (App. 152, 391 F.Supp. at 264.)

Rather than order Appellee released at that time, as we shall argue below was well within the Court's power, see Grasso v. Norton, 520 F.2d 27, if not its duty, see 5 U.S.C. §706(1), the Court instead ordered a hearing in Court "for the purpose of taking testimony on the issues of the organized crime connections of the Plaintiff Albert M. Billiteri and the appropriateness of the placement of his offense behavior in the very high severity category."

At this hearing, held April 30, 1975, the Defendants presented three witnesses, all professional criminals who are presently enrolled in the Government's witness protection program, on the issue of Plaintiff's alleged organized crime connections. The Government presented no testimony going to the other issue to be explored at the hearing, how Plaintiff's actual "offense severity" should be determined. The Government did submit transcripts of testimony of several witnesses before Federal Grand Juries (App. 129-138, 446-516), which transcripts were not before the Parole Board. The Government also offered at the hearing transcripts of telephone conversations electronically intercepted by the Government; however, authorizations for these interceptions could not be located and the Defendants withdrew them from the Court's consideration. (App. 210-211).

On the above record, the Court issued its opinion and order from which the instant appeal is taken. Billiteri v. United States Board of Parole, 400 F.Supp. 402 (App. 214-238) (Billiteri III). The Court found for the Board of Parole on the issue of Plaintiff's alleged involvement in organized crime. However, the Court held that the Board had improperly placed Appellee's case in the "very high severity" category of offense severity. Specifically, the Court held that since Appellee had been convicted only of conspiracy, 18 U.S.C. §371, an offense carrying a maximum sentence of 5 years, the Board could not, consistent with Congressional intent, place this offense in the "very high severity" category with offenses carrying a maximum sentence of 20 years. The Court further buttressed this conclusion by reference to the negotiations leading to Appellee's plea bargain with the Government:

> A further and more important consideration is the Government's negotiation for an acceptance of the plea to conspiracy. That agreement binds the Government. Santobello v. New York, 404 U.S. 257, 262-63, 92 S.Ct. 495, 30 L.Ed 2d 427 (1971); S & E Contractors, Inc. v. United States, 406 U.S. 1, 10, 92 S.Ct. 1411, 31 L.Ed. 2d 658 (1972). Now the Government, having successfully bargained away the obligation to prove extortion against Billiteri seeks to establish Billiteri's guilt of the underlying substantive offense by the bald assertion that conspiracy could not occur in a void. Examination of the plea, set forth above, however, evidences Billiteri's minimum involvement. If there was to be any discussion of Billiteri's commission of the substantive offense, that was the time. (App. 232-233, 400 F.Supp. 408-09).

Plaintiff's minimum involvement is made clear in the transcript of the plea taken May 24, 1972, the crucial part of which is excerpted in Judge Curtin's Opinion (App. 237-38, 400 F.Supp. at 407). Although the Government asserts that its statement of expected proof at the plea proceeding was not objected to (Government Brief, page 22), the limitation on the admissions being made were substantial. Appellee admitted only the making of a phone call in furtherance of a criminal conspiracy. That any actual force was used was specifically denied by counsel before the Court accepted the plea (App. 382). Most of the Government's statement was simply irrelevant to the entry of a "solid plea" (App. 379). And Judge Curtin found as a fact that the credibility of some of the witnesses upon whose Grand Jury testimony the Government's statement was based, was "open to some question,"* and further found that "this was a major factor in the Government's offering Billiteri a plea to conspiracy rather than going to trial on the substantive extortion offense charged." (App. 228, 400 F.Supp. at 406).

The Court concluded that the placement of Billiteri's offense in the very high severity category was "without rational foundation and cannot support the determination made" (App. 234, 400 F.Supp. 409) as to the proper remedy, the Court stated:

> Furthermore, another remand to the Board, in light of its past performance, is undeserved, as well as unfair to the Plaintiff. Therefore, this Court must fashion an appropriate remedy now. (App. 234, 400 F.Supp. 409).

---

* For example, one of the witnesses, Bernard Spaziani, was indicted for perjury by the Federal Grand Jury that first heard his testimony in this case. (App. 130, 522, 525).

The Court concluded that, assigned to any category below the "very high severity" category, Appellee, even if assigned the lowest possible salient factor score, had "served the maximum period of incarceration applicable under the guidelines." (App. 235, 400 F.Supp. at 409). The Court, therefore, ordered the Board of Parole to forthwith release the Plaintiff on parole. (Id.)

Appellee was released from prison pursuant to the Court's order on September 19, 1975, four days before he would have completed his maximum sentence.

POINT I

THE DISTRICT COURT HAD JURISDICTION OF THIS ACTION

The Government raises on appeal, for the first time in this case, an objection to the District Court's jurisdiction of this proceeding. Appellee contends that this objection is not well founded (even if timely and not waived), in that ample jurisdictional basis for the District Court's action exists in Habeas Corpus, 28 U.S.C. §2241, in Mandamus, 28 U.S.C. §1361, and under the Administrative Procedure Act, 5 U.S.C. §701, et. seq.*

A. THE DISTRICT COURT HAD JURISDICTION UNDER 28 U.S.C. §1361

The District Court has jurisdiction of this controversy under 28 U.S.C. §1361.** The "duty owed to the plaintiff" is to

---

* The requisite jurisdictional allegations are made in the opening paragraphs of the complaints, and, Appellee submits, are sufficient to invoke the jurisdiction of the Court: for 28 U.S.C. §2241, that plaintiff was unlawfully detained in custody by authority of the defendants, who had the power to order his release; for 28 U.S.C.§1361 and for 5 U.S.C. §701 et. seq., that plaintiff, domiciled in Buffalo, New York, is aggrieved and held in custody in violation of his federally protected rights and owed a duty by defendant, United States Parole Board, to declare him eligible for parole and order his release, and/or to provide him with Parole Board administrative procedural comporting with due process.

In addition to the Board of Parole and its members, Plaintiff originally joined the United States as a defendant, in order to assert jurisdiction also under 28 U.S.C. §2255. In light of this Court's holding in United States v. Huss, 520 F.2d 598, 603-604 (2d Cir.1975), that assertion of jurisdiction has been abandoned.

** "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

act on his application for parole in a manner consistent with due process, Johnson v. Chairman, supra.; Cardaropoli v. Norton, supra., and to declare him eligible for parole and order his release. The decisions of Federal administrative agencies, including the Parole Board, have often held reviewable under this section. See Smith v. Resor, 406 F.2d 141 (2d Cir. 1969) (Milirary); Lovallo v. Froehlke, 468 F.2d 340 (2d Cir. 1972); Schoenbrun v. Commanding Officer, 403 F.2d 371 (2d Cir. 1968); Candarini v. Attorney General, 364 F. Supp. 1132 (E.D.N.Y. 1974) (Parole Board); U.S. Ex Rel Harrison v. Pace, 357 F.Supp. 354, 356-357 (E.D.Pa. 1973) (Parole Board); Mower v. Britton, 504 F.2d 396 (10th Cir. 1974) (Parole Board).

Here, the issues are whether the Parole Board has properly followed its own regulations; and, whether the actions of the Parole Board were within the discretion granted by acts of Congress and consonant with due process. It is thus a classic case for the exercise of Mandamus jurisdiction. As Byse and Fiocca in a leading article put it:

> Properly understood, the notion that Mandamus principles should govern the availability and scope of review in an action for mandatory injunctive or declaratory relief merely restates the rule that an officer's valid exercise of the delegated power will not be controlled by the judiciary. The crucial issue in all cases is the scope of the delegated power...*
> Byse & Fiocca, Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action, 81 Harv. L. Rev. 308, 332-34 (1967).

---

* ...There are few Federal administrative determinations that do

In Leonhard v. Mitchell, 473 F.2d 709 (2d Cir. 1973), this Court discussed the scope of §1361 jurisdiction:

> Thus, a Writ of Mandamus properly is issued when a Government official fails to comply with a special statutory or regulatory direction. See, e.g., Feliciano v. Laird, 426 F.2d 424 (2d Cir. 1970) (Army failed to process application for

---

not involve an element of discretion and few that are wholly discretionary. Examples of the latter might be the President's selection of members of his cabinet and his conduct of foreign affairs; but except for this very limited class of completely discretionary functions, administrative officials typically have discretion concerning some elements of their decisions and lack of discretion concerning other elements. For example, issuance of passports is a discretionary act, but that discretion does not include withholding a passport because of the Appellant's beliefs or associations. The fact that the officer has discretion is not conclusive; the determinative issue is the scope of the discretion. Only after that issue has been resolved can it be decided whether the act in question is subject to judicial control.

In making discretionary determinations, administrative officials usually take into account a variety of factors. A litigant must contend that the applicable statute does not permit the administrator (1) to consider a particular factor, or (2) to give a particular factor controlling light, or (3) to refuse to consider a possibility relevant factor. When these conditions are presented to a Court, it must decide whether the administrator's action was consistent with the particular statute and the Congressional purpose. This is what Courts do in injunction actions against administrators and in other judicial review proceeding. The same process should be utilized in Mandamus actions, because they present the same basic issue: the proper scope of the administrator's authority.

> hardship discharge in accordance with regulations). Additionally, decisions construing §1361 has held that "official conduct may have gone so far beyond any rational exercise of discretion as to call for Mandamus even when the action is within the letter of the adority granted." U.S. Ex Rel Schoenbrun v. Commanding Officer, 403 F.2d 371, 374 (2d Cir. 1968), Cert. denied 394 U.S. 929 (1969).... Ashe v. McNamara, 355 F.2d 277 (1st Cir. 1965). 474 F.2d at 713.

Appellee respectfully submits that the issues presented herein by the Defendant Parole Board's actions toward Plaintiff are well within the established boundaries of jurisdiction under 28 U.S.C. §1361.

The Government brief does not directly consider the question of jurisdiction under §1361, but it implicitly argues against such jurisdiction by its insistence that only Habeas Corpus is proper in this action. This insistence is misplaced.

The Government argues, at page 9 of its Brief, that "release from confinement presents the most basic Habeas Corpus issue and must be presented as such," relying on Bijeol v. Benson, 513 F.2d 965 (7th Cir. 1975). This argument misconceives the thrust of the action herein, which was one to review the administrative decisions of the Parole Board. Certainly the effect of the Court's final Order below, declaring that Plaintiff had "served the maximum period of incarceration implicable under the guidelines", required Plaintiff's release, but this does not oust the District Court of jurisdiction under other statutory bases for for jurisdiction. In Lovallo v. Froehlke, 468 F.2d 340 (2d Cir. 1972), where

Plaintiff sought review of the administrative action of the United States Army in denying him discharge from active to reserve duty, this Court rejected the argument that Appellant had "sought the wrong remedy because the remedy of Habeas Corpus is available." The Court held, 468 F.2d at 344, that "whether or not Habeas Corpus was available 'the District Court was free to treat the Petition as one for Mandamus under 28 U.S.C. §1361'" citing Schoenbrun v. Commanding Officer, 403 F.2d 371, 374 (2d Cir. 1968). Lovallo v. Froehlke is exactly in point here: Appellee, alleging improper administrative action, sought release from custody, or more precisely, release from one sort of "custody" to another, from prison to parole. The square holding of the Lovallo Court, that Mandamus under §1361 may be available where Habeas is also available, makes clear that Habeas is not the exclusive remedy available to Appellee here.

Preiser v. Rodriguez, 411 U.S. 475 (1973), which Bijeol v. Benson, supra, cited for the proposition quoted by the Government, is not to the contrary. That case held, as a matter of statutory construction of 42 U.S.C. §1983, and 28 U.S.C. §2254,

> only that a State prisoner who was seeking to challenge the length of confinement could not utilize 42 U.S.C. §1983 and its jurisdictional counterpart, 28 U.S.C. §1343(3), to avoid the exhaustion requirements of §2254(b) and (c). Kahane v. Carlson No. 75-2088 (2d Cir. November 26, 1975) Slip Op. 715,727 (Friendly, J., concurring).

Here, where Appellee is a Federal, not a state prisoner (no issues

of comity and federalism being present), and where all administrative remedies have been exhausted (see Billiteri III, App. 221, 400 F.2d 405), Preiser v. Rodriguez, has no application. Even were Preiser v. Rodriguez applicable to litigation over a Federal prisoner's rights, this Court has held that Preiser does not prescribe Habeas Corpus for challenges to "the manner of parole decision-making, not its outcome." Haymes v. Regan, 525 F.2d 540, 542 (2d Cir. 1975). The District Court under this decision, would have jurisdiction at least over Appellee's challenges to the Board's failure to give him a hearing comporting with due process.

The considerations cited by the Government from Judge Friendly's concurrence in Kahane v. Carlson, Docket No. 75-2088 (2d Cir. Nov. 26, 1975), Slip. Op. 715, at 728-729 (Government's Brief at 10-12) are inapposite for parole board cases. Although the immediate custodian here is the warden, Lewisburg Federal Correctional Facility, in the Middle District of Pennsylvania, the matters truly in issue are between Appellee and the Board of Parole, and the issues involved concern only the length of confinement (and not the conditions of prison life in confinement) of a single prisoner. Therefore, the

> spectacle of the warden of a large Federal prison being answerable for prison conditions...to District Judges from Maine to Hawaii

Kane v. Carlson, supra, Slip op. at 724 is purely chimerical in this case. No discretionary decision of the warden is affected by the judgment of the Court herein; only the decision whether to retain Appellee or release him, which deci-

sion is the Parole Board's to make, and is for the warden merely a ministerial act.* Here, the warden made no appearance, submitted no evidence, and was unaffected by the proceedings or the final judgment, except that he was required to release the prisoner. He was essentially uninvolved in this litigation. The Court's mandate was directed to the Defendants Board of Parole and members thereof. Under these circumstances, Judge Friendly's concurrence, whatever its relevance to actions over the conditions of prison confinement, have no application to Parole Board review actions.

That Judge Curtin was correct in ruling that venue under 28 U.S.C. §1391(e) was proper in the jurisdiction of a prisoner's domicile has now been settled by this Court in Kahane v. Carlson, supra, Slip Op. at 717-719, 723-24.

B. THE DISTRICT COURT HAD JURISDICTION UNDER 28 U.S.C. §2241

In any event, Habeas Corpus jurisdiction is present here. Habeas Corpus jurisdiction requires that a "custodian, or one in the chain of command...be in the territorial jurisdiction of the District Court." Schlanger v. Seamans, 401 U.S. 487, 489 (1971).

---

* Nor is there any possibility of "inconsistent judgments by Courts of coordinate jurisdiction", see Bijeol v. Benson, supra, 513 F.2d at 968, of the sort that could arise either under a class action, as Bijeol, or where, for example, two district judges might order a warden to provide two different sorts of diets to religious prisoner-plaintiffs. Here, there can be no judgment in conflict with the order to release Plaintiff.

As the Court stated in Ex Parte Endo, 323 U.S. 283, 306:

> There are expressions in some of the cases which indicate that the place of confinement must be within the Court's territorial jurisdiction in order to enable it to issue the Writ. [Citations omitted] But we are of the view that the Court may act if there is a respondent within reach of its process who has custody of the Petitioner.

Defendants Parole Board members and the United States Parole Board, vested as they are with exclusive control over whether to release Federal prisoners on parole, see 18 U.S.C. §4201 et seq., are surely proper Habeas respondents. See also, Buchanan v. Clark, 445 F.2d 1379 (5th Cir. 1970). The question remaining is whether they are "within the reach of the Court's process." Ex Parte Endo, supra, 323 U.S. at 307.

Appellee submits that the Parole Board members and the Parole Board were within reach of the Court's process, for two reasons. First, Defendants were before the Court by consent. No motion to dismiss the complaints herein on the ground of lack of personal jurisdiction over Defendants was filed. Federal Rules of Civil Procedure, Rule 12(h)(1) provides that any objection to the Court's jurisdiction over the person of a Defendant is waived, unless such an objection is asserted either by Motion or in the Answer. As no such timely objection was made in the District Court, Appellants may not now be heard to object. Indeed, the Government formally conceded below that the District Court had "the right to examine the decision by the Parole Board in denying Mr. Billiteri's parole, to

determine whether or not the Board acted within its own rules and regulations." (App. 212)

Contrary to the Government's assertion (Government's Brief at page 12), the requirement of a Respondent within the Court's jurisdiction is strictly one of personal jurisdiction, and not of subject matter jurisdiction. See Rudick v. Laird, 412 F.2d 16 (2d Cir. 1969), where this Court noted "undoubtedly, subject matter jurisdiction exists. 28 U.S.C. §2241," 412 F.2d at 20, but held that no personal jurisdiction existed because "no person having custody of the Appellant is within the territorial jurisdiction of the District Court, nor is such person within the reach of the District Court's process." 412 F.2d at 21. See also Strait v. Laird, 406 U.S. 341, 345 N.2. Here, by contrast, the Appellants were fully before the Court by reason of their appearance and lack of objection.

Further, the Defendants actively consented to the jurisdiction of the District Court in their answer (App. 16, 28) by noting their formal acquiescence to the Judgement of the Court in Candarini v. Attorney General, 369 F.Supp. 1132 (E.D.N.Y. 1974), where prisoners in Danbury Correctional Facility, Connecticut, sought and were granted relief in the District of their residence, the Eastern District of New York. At the very least, this acquiescence shows a tactical decision not to contest the jurisdiction over the persons of the Defendants in this action, but rather to contest only on the merits, which decision the Government should not now be allowed to change.

Secondly, even if the Appellants had moved to dismiss for lack of personal jurisdiction over them, such a motion would properly have been denied, because the Defendants, by reason of their contacts with the forum district, were "present" before the District Court sufficiently to permit the Court to exercise personal jurisdiction over them. In Strait v. Laird, 406 U.S. 341 (1972), the Court held that the Indiana-based nominal commander of the plaintiff Army Reserve officer was "present" in the territorial jurisdiction of a California District Court by reason of his contacts with that jurisdiction, citing International Shoe Company v. Washington, 326 U.S. 310, McGee v. International Life Insurance Company, 355 U.S. 220, and Ex Parte Endo, supra. The commander's contacts with the forum included the lengthy processing of Plaintiff's application for discharge as a conscientious objector by agents located in the California District (Plaintiff's home) and "virtually every face-to-face-contact between him and the military." 406 U.S. at 344. Approvingly citing a prior decision of this Court, Arlen v. Laird, 451 F.2d 684, the Supreme Court held:

> We agree with that view. Strait's commanding officer is "present" in California through the officers in the hierarchy of the command who processed this serviceman's application for discharge. To require him to go to Indiana where he never has been or assigned to be would entail needless expense and inconvenience. It "would result in a concentration of similar cases in the District in which the Reserve

> Officer Components Personnel Center is located." Donigian v. Laird, 308 F.Supp. at 453. The concepts of "custody" and "custodian" are sufficiently broad to allow us to say that the commanding officer in Indiana, operating through officers in California in processing Petitioner's claim, is in California for the limited purposes of Habeas Corpus jurisdiction. 406 U.S. at 345-46.

Similarly, the Appellants' contacts with the District Court's territorial jurisdiction, although not their virtually exclusive contacts with Appellee as was the case in Strait, are sufficient to permit a finding that they are "present" in the Western District of New York. Much of the Board's deliberations were on information gathered by other agents of the Department of Justice in the Western District of New York* and concerned events which took place or allegedly took place in that District: Appellee's conviction and sentence were in that District, as allegedly were the additional matters relied on by the Board in its determination that Appellee's offense was of very high severity; all of the evidence on which the Board relied for its labeling of Appellee as "organized crime" concerns events which allegedly took place in that District; the Appellee's domicile, to which the Board knew he

---

* Cf. 18 U.S.C. §4208(c): "It shall be the duty of the various probation officers and government bureaus and agencies to furnish the board of parole information concerning the prisoner, and... views and recommendations with respect to parole disposition of his case"; and 18 U.S.C. §3655: "Each probation officer shall perform such duties with respect to persons on parole as the Attorney General shall request."

intended to return upon release and in which the Board would have, and now has, further (though lesser) control over him, is in that District.*

Rudick v. Laird, 412 F.2d 16 (2d Cir. 1969) is not to the contrary. There, Petitioner was a serviceman on leave who had had no contacts whatever with his California-based commander in the forum District, and who argued only "that his status of being in the Army amounts to being detained by the Secretary of the Army and the Secretary of Defense." The Court held only that, absent any contracts, and even if Plaintiff were in "custody", the named Defendants were not subject to personal jurisdiction.

In addition, the policy reasons cited by this Court in Arlen v. Laird, supra and by the Supreme Court in Strait v. Laird, supra, argue toward a finding of jurisdiction in the Western District of New York for these purposes. Most of the matters at issue in this, and in most, parole board cases arise from events located in the forum where the offense of which the prisoner was convicted took place. The prisoners will likely have easier access to counsel in the forum of their home then in that of their incarceration, often counsel with greater familiarity with the relevant facts, thus better able to aid the Court in a speedy resolution of the controversy. There is no inconvenience to the Government, which has sufficient counsel in each District; indeed, because the matters at issue largely arise from the forum district, Appellee submits that it was indeed more convenient for the Government to litigate the matter

---

* We do not argue here that the Parole Board can be sued everywhere it has agents, but only that where its agents have had sufficient contacts in the Western District of New York with Appellee's case, the Board is present within that District and subject to personal jurisdiction therein.

in the Western District of New York than elsewhere.* A contrary rule would needlessly concentrate parole board litigation in the few districts which contain Federal prisons, rather than spreading them uniformly throughout the country. The Government has no substantial interest in a contrary rule. See Strait v. Laird, supra, 406 U.S. at 345; Arlen v. Laird, supra, 451 F.2d at 687. Indeed, the Government's failure to object to jurisdiction (or to move for a change of venue) at any time before final judgment below suggests the Government's agreement as to the convenience of the forum.

For the reasons stated above (p. 25) in the discussion of §1361 jurisdiction, Judge Friendly's remarks in his separate concurrence in Kahane v. Carlson, supra, Slip Op. 723 et seq., quoted at length and relied on by the Government (Government's Brief, pp. 9-11) are not apposite here.

C. THE DISTRICT COURT HAD JURISDICTION UNDER ADMINISTRATIVE PROCEDURE ACT

Appellee respectfully submits that an independent basis of jurisdiction exists under the Administrative Procedure Act, 5 U.S.C. §701 et. seq. for the reasons stated in Judge Tuttle's opinion for the Court in Sanders v. Weinberger, 522 F.2d 1167 (7th Cir. 1975) and cases cited therein. See also: Ryse and Fiocca, supra, 81 Harv. L. Rev. at 326-331. King v. United States, 492 F.2d 1337 (7th Cir. 1974).

---

*It should be noted that Government counsel below, Mr. Dennis O'Keefe of the Organized Crime Strike Force, also represented the Government in the original criminal proceeding against Plaintiff. (See App. 370-396)

POINT II

PLAINTIFF WAS DENIED HIS MINIMAL DUE PROCESS RIGHTS IN EACH OF THE PROCEEDINGS CONDUCTED BY THE UNITED STATES BOARD OF PAROLE

A prospective parolee clearly has the right to be given a parole hearing comporting with at least minimal due process standards. See, Johnson v. Chairman, New York State Board of Parole, 500 F.2d 925 (2d Cir. 1974). Cardaropoli v. Norton, 523 F.2d 990 (2d Cir. 1975).

The first hearing given Albert Billiteri which was held on February 14, 1974, was held deficient in that the reason given to him on March 11, 1974, for the denial of parole "Release at this time would depreciate the seriousness of the offense committed and is thus incompatible with the welfare of society" (App. 11) was admitted by the Government as not meeting "the requirements of rudimentary due process". (App. 16) See also Candarini v. Attorney General, 369 F.Supp. 1132 (E.D.N.Y. 1974). It was also deficient in its failure to give Plaintiff notice or an opportunity to confront the evidence. Cardaropoli, 523 F.2d at 996.

In an attempt to rectify this clear error, a senior analyst of the Board of Parole, John Sicoli, attempted to give further reasons for the denial of Mr. Billiteri's parole. He said that Mr. Billiteri was placed in the "very high severity" bracket because he was convicted "of conspiracy and extortionate extensions of cre-

dit". (App. 17) However, this was again clear error because Mr. Billiteri had pleaded guilty only to a violation of Title 18 U.S.C. §371, the conspiracy statute which carries a 5-year maximum. (App. 19-20).

The Government's Strike Force attorney attempted to rectify this error by arguing to the District Court that nonetheless, Albert Billiteri was justifiably denied parole because conspiracy to extort, which carries a 5-year penalty, is properly placed in the same "high severity" classification as extortion which carries a 20-year penalty. (App. 29)

This is wrong for two reasons: First, as the Supreme Court said "we cannot'accept appellate counsel's post hoc rationalizations for agency action',: for an agency's order must be upheld, if at all, 'on the same basis articulated in the order by the agency itself.'" F.P.C. v Texaco, Inc. 417 U.S. 380, 397 (1974)

In the second place, it would simply be irrational to place a 5-year conspiracy statute in the "very high severity" classification with crimes that otherwise carry penalties of 20 years. Congress, had it desired, could have made the violation of §371 punishable by the amount of the substantive offense. It chose not to do so.

It is significant in this regard, that the Board of Parole in determining its table of severity guidelines "did not seek guidance from legislative or judicial sources. Rather, the Board developed an independent classification system for judging and comparing the seriousness of offenses... Further, in placing specific

types of 'offense behavior' within each of the six groups, no apparent attempt was made to implement the legislative judgment of comparability of crime severity." Parole Release Decision Making and the Sentencing Process, 84 Yale L.J. 810, 887 (1975).

As this Court in Johnson, supra, said (citing American Ship Building Co. v. N.L.R.B., 380 U.S. 300, 318 (1964), "the deference owed to an expert tribunal cannot be allowed to slip into judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress." 500 F.2d at 930-931.

The next proceeding, the Regional Board meeting held on January 13, 1975, was beneath minimal due process standards because of the continuing oj/oc designation and because of the continuing failure and refusal of the Parole Board to let hte Plaintiff see the evidence against him.

An additional due process defect occurred at the January 13, 1975, proceeding was the refusal of Patrick Glynn Assistant Counsel to the United States Board of Parole, to permit Mr. Billiteri's attorney to attend that proceeding. (App. 91) Albert Billiteri was also not given the opportunity to attend that proceeding.*

---

* For some reason, the Board found it significant to note that the proceeding was not part of the Board's Appellate process. "Billiteri's case was referred to the National Board for an original determination. This was not an appeal". (Board of Parole's "Answer", App. 92). But whether a "review" hearing [the Board's name for an appeal] or an "initial hearing," under the Board's own regulations, a person is entitled to be present personally and with a "person of his choice" 28 C.F.R. §§2.12-2.14. It is axiomatic that an agency denies due process when it violates its own rules; in this case there was also a denial of due process because of the failure to permit the

In light of this Court's decision in Cardaropoli v. Norton, 523 F.2d (2d Cir. 1975), Judge Curtin was clearly correct in holding that the Board's procedures herein did not comport with due process. The Board's failure, for both the hearing of February 14, 1974, and the hearing of December 11, 1974, to give Appellee advance written notice of their proposed oj/oc label, is squarely condemned by Cardaropoli, 523 F.2d at 996. Defendants' refusal to allow Appellee to see the evidence against him (the presentence report, the Petersen Memorandum, and the rest of the file), or to have meaningful contact with the actual decision making body (here, the Regional Board in Kansas City), is similarly defective.* Id.

Plaintiff to have an attorney, or to appear before an impartial decision-maker, as mandated in Cardaropoli, supra. 523 F.2d at 996.

* The reasoning of Cardaropoli and of Johnson v. Chairman, New York State Board of Parole, 500 F.2d 925 (2d Cir. 1974), requires due process safeguards for the decision of factual issues of the "very high severity" label as well as for the oj/oc label. The consequences of a factually erroneous decision on this issue are, if anything, more substantial: as here, an inflated offense severity classification will likely lengthen a prisoner's time of incarceration. The decision on release (unlike the somewhat collateral issue of the oj/oc designation) therefore falls squarely within the rationale of Johnson, 500 F.2d 925 at 927-28 and Morissey v. Brewer, 408 U.S. 471 (1972). At least some procedural safeguards are therefore due, and Appellee submits that at least the basic procedures of rudimentary due process mandated in Cardaropoli should be required here. Appellee would argue that greater procedural protection would be required, where the "grievious loss" here, an additional substantial period of incarceration, is a more serious deprivation of liberty than are the alterations in conditions of confinement, eligibility for furloughs and transfers, and the like, at issue in Cardaropoli. However, since the procedures of the Board here fall far short even of the requirements of Cardaropoli, such argument is unnecessary here.

Grattan v. Sigler, 525 F.2d 329 (9th Cir. 1975), included in the back of the Government's Brief, is precisely on point in the severity classification issue: where the Parole Board sought to increase the offense severity rating, the prisoner "should have been given such reasonable notice of the change as to enable him to challenge" the accuracy of the information on which such a change was based. Grattan v. Sigler, supra, 525 F.2d at 331. Whether the "very high severity" classification is regarded as an increase from the more natural classification of the 5-year conspiracy offense, or as the assignment to a classification of a crime not listed in the guideline table, the Board here clearly should have given Appellee notice of its intended classification.

POINT III

THE BOARD'S DENIAL OF DUE PROCESS TO THE PLAINTIFF PERMITS, INDEED REQUIRES, THE ORDER RELEASING APPELLEE FROM PRISON

Appellants do not directly confront the denial of due process, and do not mention either Johnson or Cardaropoli in their brief. Rather, they challenge Judge Curtin's review of the basis of the Board's decision on the offense severity classification, which challenge will be more fully addressed later in this brief. Appellee submits, however, that Judge Curtin's finding (correct under Cardaropoli and Johnson) that the Board's hearings were constitutionally defective, and the finding that the second Board hearing was not in compliance with the Court's Order in Billitieri I are a sufficient basis for affirmance of the Court's order that Appellee be released.

In Grasso v. Norton, 520 F.2d 27 (2d Cir. 1975), this Court affirmed a District Court order which was based on a finding that the Court's earlier order remanding for a Parole Board hearing had not been complied with. As in this case:

> At no time did the Board apply to the Court for a modification or clarification of the conditional writ, as it should have done had it been in any doubt as to what the writ meant. 520 F.2d at 37-38. *

---

* In this case, see the dubious expressions of confusion over the meaning of the order in the Government's responsive papers at App. 70-71, 95 and 127.

This Court concluded:

> The conditional writ stated clearly what the consequences would be if the Board of Parole failed to comply with its directions, i.e., that Grasso would be discharged from custody. The Board chose to risk such consequences by its refusal to give Grasso the institutional hearing which the conditional writ required.
>
> Under these circumstances, it was within Judge Newman's sound discretion to issue the final writ discharging Grasso from custody. 520 F.2d at 38.

Here, Judge Curtin's order of November 26, 1974, was virtually identical to Judge Newman's. It stated:

> This Court mandates that the Defendants discharge the Plaintiff from Federal custody, unless within 30 days the United States Board of Parole reconsiders his application for release in a manner consistent with this opinion. (App. 51, 385 F.Supp. at 1220).

And here the Court concluded that the Board's reconsideration was not consistent with the November 26, 1974 Opinion and Order, and was "in many respects worse than that which came before." (App. 147 391 F.Supp. at 262.) See also Billiteri III, 400 F.Supp. at 405. Although the December 11, 1974 hearing, such as it was, was within the 30-day period, the actual decision was not made until the file was reviewed in Kansas City on January 13, 1975, almost three weeks after the period expired.

In addition to the Courts inherent power to see its orders enforced (codified in part in 28 U.S.C. §1651), authority for the

Court's order may be found in 5 U.S.C. §706(1), which gives the Court power, in a case under the Administrative Procedure Act, to "compel agency action unlawfully withheld or unreasonably delayed," as an adjunct to its power to review and set aside agency actions and conclusions as provided in §706(2).* Here, Judge Curtin concluded, in effect, that parole had been unlawfully withheld from Appellee, and that this action had been unreasonably delayed. Upon these findings, the Court was fully justified in ordering Appellee released, rather than remanding for the further proceedings which the Court had justifiably concluded would be futile and productive merely of further unreasonable delay.

Appellee further submits that the Court below was not merely permitted, but required, to release Plaintiff, once it had made its findings that the Board had twice denied Plaintiff due process, with considerable attendant delay, and that a further remand would be inequitable (i.e., that the Board, in light of its past performance, could no longer be trusted to treat Appellee fairly.)**

---

* This conclusion does not, of course, depend on a determination that the Administrative Procedure Act provides an independent source of subject matter jurisdiction. A Court with jurisdiction, from whatever source, may review the action of an agency under the Administrative Procedure Act, which, if it does not provide an independent source of jurisdiction, at least regulates the mode of review. Although this Court has never had occasion to decide the question, Appellee submits that the Board of Parole is an agency subject to review under the A.P.A. See King v. United States, 492 F.2d 1337 (7th Cir. 1974); Pickus v. United States Board of Parole, 507 F.2d 1107 (D.C. Cir. 1974); Young v. Director, 367 F.2d 331 (D.C. Cir. 1966).

** The contrast between Billiteri I and Billiteri II is instructive as to the Court's properly growing impatience with the Parole Board.

Like the Government, we find no precedent for a Court, sitting in review of an Agency's determinations such as that of the Board's holding a de novo hearing on the central issues of fact, rather than merely reviewing the actions taken by the agency upon the record before the agency. At least, if the Court exceeded its authority in holding such a hearing, the Court's only other choice, given its findings, was to order Appellee released at that time.

The Government argues that the proper course for Judge Curtin was to remand for yet another hearing, despite his findings that the Board was "undeserving" of another chance, and that another remand would be "unfair to the Plaintiff". 400 F.Supp. at 409 For the Government to argue this is to argue that Plaintiff is to bear the full burden of the Board's repeated errors and delays. Plaintiff, who remained in jail until ordered released by Judge Curtin, would have served his maximum sentence before the Board completed another cumbersome round of hearing and "appeal". The District Court, contrary to the implications of the Government's argument,

---

In Billiteri I, the Court acted with traditional restraint, stating that it did not intend to act as a "super Parole Board", (App. 49, 385 F.Supp. at 1226), and ordered a remand. In Billiteri II, the Court,clearly dismayed with the Defendants action on remand--with its casual disregard for the Court's order, the revelation of the false denial of the oj/oc designation, the hollow-sounding disclaimer of reliance on that label, the flimsy excuses offered for ponderous bureaucratic delay, the dubious claims of confusion over the meaning of the Court's November 26, 1974 order, the after-the-fact rationalizations--was no longer prepared to rely on the good faith of the Parole Board. Yet the Court, keeping in mind "the interests of the Plaintiff and the Government in seeing these difficult questions resolved," (App. 222, 400 F.Supp. at 405) acted with much greater restraint that we believe was necessary, and ordered a hearing. Only after this hearing did the Court exercise its discretion (as described in Grasso v. Norton, supra,)and ordered Appellee released.

cannot be held powerless to enforce rights which would simply be lost if the Court could only order another remand.

Further, it is hardly clear that another remand would serve any purpose whatsoever. The Court's ruling on the determinative issue, the offense severity classification, is one of law, on which no further factual determination can be made. Under these circumstances, no remand is even relevant to the issues.

POINT IV

JUDGE CURTIN CORRECTLY RULED THAT APPELLEE'S OFFENSE SEVERITY WAS IMPROPERLY CLASSIFIED AS "VERY HIGH"

The Government argues, in Point II and in Point III of its Brief, that the Court below erred in its determination that the Board had assigned the wrong severity classification to Appellee's offense. More broadly, the Government asserts that Judge Curtin held that the Board could not consider anything but the adjudicated offense, contrary to the holdings of Lupo v. Norton, 371 F.Supp. 156 (D. Conn. 1974), Grattan v. Sigler, 525 F.2d 329 (9th Cir. 1975), and Manos v. Board of Parole, 390 F.Supp. 1103 (M.D.Pa. 1975). This argument of Defendants is directed at a straw man, as a close reading of Judge Curtin's decisions makes clear that his holding as to offense severity do not rest on any such basis.

In Billiteri II*, the Court held only that the use of the allegations contained in the "unseen presentence report" in making the "very high severity" classification, without allowing Appellee to see and contest those allegations, denied him due process. "The opportunity thus far afforded to Billiteri to contest these allegations, however, was deficient." (App. 151, 391 F.Supp. at 263-64). As argued in Point II above, this holding is clearly correct under

---

* In Billiteri I, the Court specifically did not consider the issue: "We express no views at this time on that issue in light of the clear error below." (App. 50-51, 385 F.Supp. at 1220).

Cardaropoli, supra, and Grattan, supra. The Court then put off further consideration of the offense severity classification until its opinion in Billiteri III, issued after the April 30, 1975 hearing in open Court.

In Billiteri III, the Court noted that "conspiracy is not listed on the Board's guidelines." 400 F.Supp. at 408. The Government argues that "since Billiteri's conviction offense, conspiracy, is not an offense listed on the severity scale of the parolling guidelines, his severity rating had to be determined by reference to the narrative description of the offense behavior in the presentencing report. That behavior most nearly resembled the very high severity offense of extortion." (Government Brief, p. 7). The Court noted that no factual basis was set forth for this conclusion, making it difficult for a court to review the path of reasoning that lead the Parole Board to the strikingly extraordinary result of placing "an offense carrying a maximum sentence of 5 years in the category with an offense carrying a maximum sentence of 20 years." 400 F.Supp. at 408. The Court concluded, in effect, that Congress had not authorized the very large discretion claimed by the Board. (The Court therefore did not reach the question, which it alluded to in passing, whether the reason stated, without citing a factual basis for the Board's conclusion, is a statement of reasons sufficient to afford the prisoner meaningful judicial review. Candarini v. Attorney General, supra; Johnson v. Chairman, supra; cf. United States v. Stewart, 478 F.2d 106 (2d Cir. 1972); Checkman v. Laird, 469 F.2d 773, 780-81 (2d Cir. 1972).

The Court further supported its conclusion that the Board could not properly inflate a 5-year conspiracy offense to the level of a 20-year offense, by reference to the extensive plea negotiations in Plaintiff's case. The Court found that the Government's case was not terribly strong, that the credibility of some of its witnesses was "open to some question,"* and specifically that "this was a major factor in the Government's offering Billiteri a plea to conspiracy." 400 F.Supp. at 407. In short, this was a firm bargain, with advantages and concessions on both sides. In the Court's view, this bargain bound the Government, under the holding of Santobello v. New York, 404 U.S. 257 (1971), and thus limited the Government's power to treat him as though he had been convicted of more than conspiracy.

The Court concluded that the Parole Board's conclusion was "without rational foundation and cannot support the conclusion made." 400 F.2d at 408.

Appellee submits that the Court was correct. The Board, in inflating the offense severity classification acted first, without the notice and due process hearing as required under Cardaropoli, supra, and Grattan, supra, and secondly, in violation of Congressional intent: by, in effect, classifying Plaintiff as though he had committed a 20-year felony, the Board simply acted in defiance of the Congressional determination of the severity of offenses. See Yale Law Journal, supra, at 887.

---

*For example, one of the witnesses against Billiteri, one Bernard Spazinni, was under indictment for perjury. (App. 130, 522, 525).

The Court noted that the Government at the hearing of April 30, 1975, put in no testimony concerning the offense severity classification, but submitted only transcripts of Grand Jury testimony, given without cross-examinaion. (App. 228, 400 F.Supp. at 407). In essence, then, Judge Curtin, as a finder of fact, chose not to believe those witnesses whose testimony was not subject to cross-examination and whose testimony was in any event "open to some question". He relied on Billiteri's statement at the entry of the plea that he had made only one telephone call in furtherance of the conspiracy. Clearly, there is support in the record for this finding.

POINT V

THE HEARING CONDUCTED BY JUDGE CURTIN WITH RESPECT TO THE ORGANIZED CRIME LABEL, DID NOT COMPORT WITH DUE PROCESS STANDARDS AND THE PLAINTIFF WAS SERIOUSLY PREJUDICED THEREBY

Both the Government and the Plaintiff agree that it was improper for Judge Curtin to hold his April 30, 1975 hearing. Assuming arguendo the propriety of even holding that hearing, the Court reached an erroneous decision in finding that Mr. Billiteri could properly be classified "organized crime". In Cardaropoli v. Norton, 523 F.2d 990 (2d Cir. 1975), this Court held that minimal due process required notice that the organized crime designation was being considered and that "the notice must specify the reason or reasons for the purposed designation and provide a brief description of the evidence to be relied upon."* 523 F.2d at 996

This was never done and was highly prejudicial to the Plaintiff because his attorney had no way to prepare for this hearing or to understand what the significance of testimony was at the time that the witnesses were on the stand.

Because of the lack of notice, the attorney never guessed Joseph Zito's testimony with regard to "jurisdiction" over one

---

* Surely, the presentence report which Judge Curtin ordered turned over to the Plaintiff did not comply with Cardaropoli's mandates of notice, as Judge Curtin himself referred tothe evidence of Billiteri's alleged criminal conduct there as "oblique statements...based substantially on hearsay." 391 F.Supp. at 263

alleged loan would indicate "that he held a position of some prominence in the local criminal world." 400 F.Supp. at 406-407.

In fact, it is submitted that Judge Curtin's findings to that effect was not based on any substantial evidence. On cross examination of Zito, the following was adduced

> Q. You never did engage in any other activities so far as collecting loans in Buffalo is concerned?
>
> A. That's correct.
>
> Q. And you know of no specific instances where Mr. Billiteri did?
>
> A. No.
>
> Q. So that you tell us about one incident sometime in 1968, you say?
>
> A. Yes.
>
> Q. And you told us about some talk about engaging in book making activity?
>
> A. That's correct.
>
> Q. And that is the sole extent of what you had to say about Mr. Billiteri?
>
> A. That's correct. (App. 280-281)

It is submitted that a review of the hearing held on April 30th will show that the pattern of Joseph Zito's testimony is repeated throughout and that even after Zito testified and the testimony was ninety percent completed, Judge Curtin agreed that "it hasn't even been established in here that there is even a

criminal syndicate"(App. 316), let alone that Albert Billiteri was a "prominent figure" in that non-existent syndicate. 400 F. Supp. at 406.

It is respectfully submitted that in light of the above, the hearing held on April 30th, is without precedent and unlawful, denied the Plaintiff his due process rights, and that the conclusion reached is not supported by the evidence adduced therein.

CONCLUSION

For the above reasons, the judgment below should be affirmed.

DATED: Buffalo, New York
January 31, 1976

PHILIP B. ABRAMOWITZ, ESQ.
76 Niagara Street
Buffalo, New York 14202
Telephone No. (716) 855-0717

Attorney for Appellee

Of Counsel

MARTOCHE, COLLESANO,
ABRAMOWITZ & GELLER
ROBERT C. MACEK, on
the Brief
76 Niagara Street
Buffalo, New York 14202
Telephone No. (716) 855-0717

APPENDIX

APPENDIX OF STATUTES AND REGULATIONS INVOLVED

UNITED STATES CODE, TITLE 5:

§ 701. Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891–1902, and former section 1641(b) (2), of title 50, appendix; and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 392.

§ 703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement. Pub.L. 89–554, Sept. 6, 1966, 80 Stat. 392.

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 393.

UNITED STATES CODE, TITLE 28:

§ 1361. Action to compel an officer of the United States to perform his duty

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff. Added Pub.L. 87-748, § 1(a), Oct. 5, 1962, 76 Stat. 744.

§ 2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless -

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

June 25, 1948, c. 646, 62 Stat. 964; May 24, 1949, c. 139, § 112, 63 Stat. 105; Sept. 19, 1966, Pub.L. 89-590, 80 Stat. 811.

CODE OF FEDERAL REGULATIONS, TITLE 28:

§ 2.12 Hearing procedure.

(a) Prisoners shall be given written notice of the time and place of the hearing described in §§ 2.13 and 2.14. Prisoners may be represented at hearings by a person of their choice. The function of the prisoner's representative shall be to offer a statement at the conclusion of the interview of the prisoner by the examiner panel, and to provide such additional information as the examiner panel shall request. Interested parties who oppose parole may select a representative to appear and offer a statement. The presiding hearing examiner shall limit or exclude any irrelevant or repetitious statement.

(b) No interviews with the Board, or any representative thereof, shall be granted to a prisoner unless his name is docketed for a hearing in accordance with Board procedures. Hearings shall not be open to the public, and the records of all such hearings shall be treated as confidential and shall not be open to inspection by the prisoner concerned, his representative or any other unauthorized person.

§ 2.13 Initial hearing.

(a) An initial hearing shall be conducted by a panel of two hearing examiners designated by the Board. The examiner panel shall inform the prisoner of the decision and, if parole is denied, of the reasons therefor. The decision of the examiner panel, subject to provisions of § 2.23 (b) and (c) shall be final unless action is initiated by the Regional Director pursuant to § 2.24.

(b) In accordance with § 2.18 the reasons for parole denial may include, but are not limited to, the following reasons, with further specification where appropriate:

(1) Release at this time would depreciate the seriousness of the offense committed and would thus be incompatible with the welfare of society.

(2) There does not appear to be a reasonable probability at this time that the prisoner would live and remain at liberty without violating the law.

(3) The prisoner has (a serious) (repeated) disciplinary infraction(s) in the institution.

(4) Additional institutional treatment is required to enhance the prisoner's capacity to lead a law-abiding life.

(c) In lieu of or in combination with the reasons in paragraph (b) (1) and (2) of this section the prisoner after initial hearings shall be furnished a guideline evaluation statement which includes the prisoner's salient factor score and offense severity rating as described in § 2.20, as well as the reasons for a decision to continue the prisoner for a period outside the range indicated by the guidelines.

(d) Written notification of the decision or referral under § 2.17 or § 2.24 shall be mailed or transmitted to the prisoner within fifteen working days of the date of the hearing. If parole is denied, the prisoner shall also receive in writing as a part of the decision, the reasons therefor.

§ 2.14 Review hearings.

All hearings subsequent to the initial hearing shall be considered as review hearings. Review hearings by examiners designated by the Board shall be scheduled for each Federal institution, and prisoners shall appear for such hearings in person, except for the following cases:

(a) A case receiving a continuance of six months or less shall be considered by an examiner panel on the record (including a current institutional progress report).

(b) A prisoner with a sentence under 18 U.S.C. 4208(a)(2) or 924 who receives a continuance to a date past one-third of his maximum sentence at an initial hearing shall upon completion of one-third of his sentence receive a review by an examiner panel on the record (including a current institutional progress report).

(c) A prisoner sentenced under the Youth Corrections Act or Federal Juvenile Delinquency Act who receives a continuance of two years or more shall receive a review by an examiner panel on the record (including a current institutional progress report) upon completion of eighteen months of such continuance.

(d) Notification of review decisions shall be given as set forth in § 2.13(c). No prisoner shall be continued for more than three years from the time of the last hearing without further review.

§ 2.17 Original jurisdiction cases.

(a) A Regional Director may designate certain cases to be within the original jurisdiction of the Regional Directors. All original jurisdiction cases shall be heard by a panel of hearing examiners who shall follow the procedures provided in § 2.12. A summary of this hearing and any additional comments that the hearing examiners may deem germane shall be submitted to the five Regional Directors. The Regional Directors shall make the original decision by a majority vote.

(b) The following criteria will be used in designating cases for the original jurisdiction of the Regional Directors:

(1) *National security.* Prisoners who have committed serious crimes against the security of the nation, e.g., espionage or aggravated subversive activity.

(2) *Organized crime.* Persons who the Regional Director has reason to believe may have been professional criminals or may have played a significant role in an organized criminal activity.

(3) *National or unusual interest.* Prisoners who have received national or unusual attention because of the nature of the crime, arrest, trial or prisoner status, or because of the community status of the offender or his victim.

(4) *Long-term sentences.* Prisoners sentenced to a maximum term of forty-five years (or more) or prisoners serving life sentences.

§ 2.20 Paroling policy guidelines; statement of general policy.

(a) To establish a national paroling policy, promote a more consistent exercise of discretion, and enable fairer and more equitable decision-making without removing individual case consideration, the United States Board of Parole has adopted guidelines for parole release consideration.

(b) These guidelines indicate the customary range of time to be served before release for various combinations of offense (severity) and offender (parole prognosis) characteristics. The time ranges specified by the guidelines are established specifically for the cases with good institutional adjustment and program progress.

(c) These time ranges are merely guidelines. Where the circumstances warrant, decisions outside of the guidelines (either above or below) may be rendered. For example, cases with exceptionally good institutional program achievement may be considered for earlier release.

(d) The guidelines contain examples of offense behaviors for each severity level. However, especially mitigating or aggravating circumstances in a particular case may justify a decision or a severity rating different from that listed.

(e) An evaluation sheet containing a "salient factor score" serves as an aid in determining the parole prognosis (potential risk of parole violation). However, where circumstances warrant, clinical evaluation of risk may override this predictive aid.

(f) These guidelines do not apply to parole revocation or reparole considerations. The Board shall review the guidelines periodically and may revise or modify them at any time as deemed appropriate.

(Table on next page)

Adult guidelines for decisionmaking, average total time (in months) served before release (including jail time)

(Revised April 1974)

Offense characteristics—Severity of offense behavior (examples)	Offender characteristics—Parole prognosis (salient factor score)			
	Very good (11–9)	Good (8–6)	Fair (5–4)	Poor (3–0)
Low	6–10	8–12	10–14	12–16
Immigration law violations				
Minor theft (includes larceny and simple possession of stolen property less than $1,000)				
Walkaway				
Low moderate	8–12	12–16	16–20	20–26
Alcohol law violations				
Counterfeit currency (passing/possession less than $1,000)				
Drugs: Marijuana, possession (less than $500)				
Firearms Act, possession/purchase/sale single weapon—not altered or machinegun				
Forgery/fraud (less than $1,000)				
Income tax evasion (less than $3,000)				
Selective Service Act violations				
Theft from mail (less than $1,000)				
Moderate	12–16	16–20	20–24	24–30
Bribery of public officials				
Counterfeit currency (passing/possession $1,000–$19,999)				
Drugs:				
"Hard drugs," possession by drug user (less than $500)				
Marijuana, possession ($500 or more)				
Marijuana, sale (less than $5,000)				
"Soft drugs," possession (less than $5,000)				
"Soft drugs," sale (less than $500)				
Embezzlement (less than $20,000)				
Explosives, possession/transportation				
Firearms Act, possession/purchase/sale altered weapon(s), machine-gun(s), or multiple weapons				
Income tax evasion ($3,000–$50,000)				
Interstate transportation of stolen/forged securities (less than $20,000)				
Mailing threatening communications				
Misprison of felony				
Receiving stolen property with intent to resell (less than $20,000)				
Smuggler of aliens				
Theft, forgery/fraud ($1,000–$19,999)				
Theft of motor vehicle (not multiple theft or for resale)				
High	16–20	20–26	26–32	32–38
Burglary or larceny (other than embezzlement) from bank or post office				
Counterfeit currency (passing/possession $20,000 or more)				
Counterfeiting (manufacturing)				
Drugs:				
"Hard drugs," possession by drug-dependent user ($500 or more)				
"Hard drugs," sale to support own habit				
Marijuana, sale ($5,000 or more)				
"Soft drugs," possession ($5,000 or more)				
"Soft drugs," sale ($500–$5,000)				
Embezzlement ($20,000–$100,000)				
Interstate transportation of stolen/forged securities ($20,000–$100,000)				
Mann Act (no force—commercial purposes)				
Organized vehicle theft				
Receiving stolen property ($20,000–$100,000)				
Robbery (no weapon or injury)				
Theft, forgery/fraud ($20,000–$100,000)				
Very high	26–36	36–45	45–55	55–65
Robbery (weapon)				
Drugs:				
"Hard drugs," possession by nondrug-dependent user ($500 or more) or by nonuser (any quantity)				
"Hard drugs," sale for profit [no prior conviction for sale of "hard drugs"]				
"Soft drugs," sale (more than $5,000)				
Extortion				
Mann Act (force)				
Sexual act (force)				
Greatest	(Greater than above—however, specific ranges are not given due to the limited number of cases and the extreme variations in severity possible within the category.)			
Aggravated felony (e.g. robbery, sexual act, assault)—weapon fired or serious injury				
Aircraft hijacking				
Drugs: "Hard drugs," sale for profit [prior conviction(s) for sale of "hard drugs"]				
Espionage				
Explosives (detonation)				
Kidnapping				
Willful homicide				

NOTES

1. If an offense is not listed above, the proper category may be obtained by comparing the severity of the offense behavior with those of similar offenses listed.
2. If an offense behavior can be classified under more than one category, the most serious applicable category is to be used.
3. If an offense behavior involved multiple separate offenses, the severity level may be increased.
4. If a continuance is to be given, allow 30 days (1 month) for release program provision.
5. These guidelines are predicted upon good institutional conduct and program performance.
6. "Hard drugs" include heroin, cocaine, morphine, or opiate derivatives, and synthetic opiate substitutes.

I HEREBY CERTIFY that two (2) copies of the enclosed Brief of Appellee were mailed to RICHARD L. THORNBURGH, Assistant Attorney General Attention: Patrick J. Glynn, Department of Justice, Washington, D. C.

DATED: January 31, 1976

Philip B. Abramowitz

Affidavit of Service

Monroe County's
Business/Legal Daily Newspaper
Established 1908

11 Centre Park
Rochester, New York 14608
Correspondence: P.O. Box 6, 14601
(716) 232-6920

Johnson D. Hay/Publisher
Russell D. Hay/Board Chairman

The Daily Record

Febraury 24, 1976

Re: Billiteri v United States Board of Parole et al

State of New York)
County of Monroe) ss.:
City of Rochester)

Ann M. Updaw

Being duly sworn, deposes and says: That he is associated with The Daily Record Corporation of Rochester, New York, and is over twenty-one years of age.

That at the request of

Mr Philip B. Abramowitz, Esq. of Martoche, Collesano, Abramowitz, and Geller

Attorney(s) for

Appellee

(s)he personally served three (~~3~~ 2) copies of the printed ☐ Record ☒ Brief ☐ Appendix of the above entitled case addressed to:

PATRICK J. GLYNN,ESQ.
DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

☒ By depositing true copies of the same securely wrapped in a postpaid wrapper in a Post Office maintained by the United States Government in the City of Rochester, New York.

☐ By hand delivery

Ann M. Updaw

Sworn to before me this 24th day of Feb, 1976

John S. Marr

~~Notary Public~~
Commissioner of Deeds